

EXCLUSIVE NEGOTIATION AGREEMENT

THIS EXCLUSIVE NEGOTIATION AGREEMENT (the "Agreement") is entered into by and between the CITY OF UPLAND, a municipal corporation ("City"), and City Ventures Homebuilding, LLC, a Delaware limited liability company ("Developer"), (City and Developer may be referred to herein individually as a "Party" or collectively as the "Parties").

RECITALS

WHEREAS, the City owns the real property located at the North-West corner of 1st Avenue and A Street, described as parcels 1046-591-08, 09, 10, 11, 12 and 13 with a total land area of 43,125 square feet or .99 acres, which consists of a 2,241 sq. ft. vacant building on parcel 13 and 8 public parking spaces ("the Property"), the legal description of which is attached hereto as **Exhibit A**; and

WHEREAS, Developer has proposed a general concept for a residential development which is proposed to be developed, in part, upon the Property (the "Proposed Project"); and

WHEREAS, the Proposed Project, whether on the Property and/or adjoining properties, would be located in the Old Town District and is currently subject to the Specific Plan previously adopted for that area by the City, known as the "Historic Downtown Upland Specific Plan"; and

WHEREAS, Developer represents that it has thoroughly educated itself regarding and evaluated the existing Specific Plan and its requirements as applicable to the proposed development as it may be hereafter conceptualized, and understands that City contemplates that the Specific Plan presently requires Developer to satisfy certain development standards, except as may be modified or otherwise permitted by any DDA which may be entered into between the City and Developer, and that any project approval would require the implementation of all conditions and mitigation measures under which the Project may ultimately be entitled; and

WHEREAS, the City and Developer desire to enter into an Exclusive Negotiating Agreement for the purpose of negotiating a Disposition and Development Agreement ("DDA") for the Property,

NOW, THEREFORE, for valuable consideration, the receipt of which is hereby acknowledged, City and Developer mutually agree as follows:

1. PURPOSE

The purpose of this Agreement is to provide for the exclusive negotiation between the Parties of a DDA, which is anticipated to encompass, among other things, the following relating to the Property and/or the Proposed Project:

- A. Sale of the Property to Developer by the City, as Owner of the Property, for development and construction of the Proposed Project. The Proposed Project shall be subject to and consistent with the requirements of the California Environmental Quality Act, related State Guidelines and related local ordinances (collectively, "CEQA and Local Laws") and any DDA entered into between the City and Developer as contemplated herein.
- B. Coordination of the planning, design and construction of the Proposed Project, including evaluation by Developer of marketability, feasibility, ability to acquire property or agreements with adjoining property owners, etc. that may be necessary to full implementation of the Proposed Project. Developer shall keep City advised as the specific parameters, scope, nature, maximum density, phasing and other specifics of the Proposed Project as it develops in more detail, and shall be responsible for public outreach, seeking community input, and securing all necessary land use approvals which may be required.
- C. The respective participation and responsibilities of Developer and City necessary to further the purpose of developing the Proposed Project, including, but not limited to, processing relevant fees, approvals and permits, which would be intended to be memorialized in any DDA and/or OPA executed to further the Proposed Project.

2. EXCLUSIVE RIGHT TO NEGOTIATE

- A. City hereby grants to Developer, and Developer hereby accepts, an exclusive right to negotiate in accordance with the terms of this Agreement, for a period of six (6) months, commencing on the effective date of this Agreement and continuing in full force and effect until expiration or earlier termination pursuant to Paragraph 2C and Paragraph 5 below.
- B. City and Developer agree, for the period set forth in this Paragraph 2, to negotiate diligently and in good faith in order for the City to prepare a DDA to be entered into by City and Developer with regard to the purposes described above. During the term of this Agreement, City agrees not to negotiate for the development of the Property, or any portion thereof, with any party other than Developer, or to initiate any other development of the Property.
- C. In the event that Developer determines that the Project is not feasible, or that the parties are not likely to finalize and execute a mutually agreeable DDA, Developer may terminate this Agreement by delivering written notice thereof to City. Upon such termination, the Good Faith Deposit (as hereinafter defined) shall be refunded in full to Developer and all other obligations under this Agreement shall terminate, except in the case of any breach of this Agreement or its good faith obligations.

3. TERMS AND CONDITIONS OF THE EXCLUSIVE NEGOTIATION AGREEMENT

City and Developer hereby agree to the following terms and conditions:

Good Faith Deposit. At the time of execution of the Agreement, Developer shall pay into an escrow account a “Good Faith Deposit” in the amount of **Twenty-Five Thousand Dollars (\$25,000)** to go towards the payment of the site. In addition, Developer is responsible for all applicable escrow fees as well. In the event that City and Developer fail to enter into a DDA for the Project, or this Agreement terminates, or the exclusive negotiation period expires, all of the Good Faith Deposit, minus applicable escrow fees, shall be refunded to Developer within ten (10) business days after the termination or expiration of this Agreement, except as may otherwise be agreed in writing by the Parties.

- A. Financial Investment. City and Developer, in entering into this Agreement, have directed their respective representatives to undertake negotiations regarding the public and private investment required to accomplish the objectives intended by a proposed DDA. During the first sixty (60) day period of this Agreement, Developer shall submit to City evidence reasonably satisfactory to City demonstrating that Developer will obtain the necessary debt and equity financing in an amount sufficient to pay for the lease and development of the Property and to actually implement the whole of the Proposed Project.
- B. City’s Right to Additional Information. City reserves the right, during the term of this Agreement, to request reasonable additional information and data from Developer necessary for review and evaluation of the Proposed Project, related agreements, financing, etc. Developer agrees to provide such additional information or data as requested in a timely manner. All proprietary information provided by Developer to City shall remain confidential to the extent permissible by law.
- C. Developer hereby agrees to deposit with the City an initial amount of **Ten Thousand Dollars (\$10,000)** in the form of cash or a check payable to the City (the “City Deposit”), to be used by the City to pay out of pocket City Costs. The Developer shall deliver this amount to the City within five (5) business days after the execution of this Agreement.

As used in this Agreement, “out of pocket City Costs” means all costs incurred by the City in connection with the negotiation, execution and approval of the DDA and sale of the property subject to the DDA, except for time expended by salaried City employees (which time shall be tracked for later reimbursement), including without limitation the following:

- (i) the fees and expenses of any consultants to the City engaged by the City in connection with the Project and DDA (such as engineers, legal counsel, and financial advisors), provided that legal fees shall not exceed Five Thousand and 00/100 Dollars (\$5,000.00).

(ii) the costs of appraisals, studies and other reports necessary or deemed advisable by City staff in connection with the Project and DDA,

(iii) costs of publication of notices, preparation and mailing of notices relating to the Project or approval and execution of the DDA,

(iv) any and all other actual costs and expenses incurred by the City with respect to the Project or the DDA.

- D. If, at any time prior to the approval and execution of the DDA, the unexpended, unencumbered and uncommitted balance of the Deposits is less than \$1,000, the City may request, in writing, that the Developer make an additional deposit in an amount estimated to be sufficient, together with any such unexpended, unencumbered and uncommitted balance, to pay for all City Costs. The Developer shall make such additional deposit with the City within ten (10) business days of the delivery to the Developer of the City's written request therefor. If the Developer fails to make any such additional deposit within such ten (10) business day period, the City may cease all work related to the Project and the DDA.
- E. Hazardous Materials. City shall not be responsible for conducting or financing any testing of the Property for hazardous materials pursuant to any applicable laws, statutes, rules and regulations.
- F. Schedule of Performance. City and Developer shall attempt to meet in good faith in order to meet deadlines as set forth on **Exhibit B** hereto. The dates set forth in the Schedule of Performance are estimates and the Parties agree that so long as Developer is proceeding in good faith, additional time for completion of one or more steps shall be provided as reasonably agreed by the Parties, provided that the Agreement term in Section 2A will not be extended.
- G. No Obligation by City. It is understood by Developer and City that nothing herein shall obligate or be deemed to obligate City to approve or execute a DDA, to commence any actions for voluntary or involuntary acquisition of real or personal property, or any interest therein, or convey any interest in any portion of the Property or any adjoining properties to Developer. The parties understand and agree that the City cannot be obligated to approve or execute a DDA, commence any action for acquisition or convey any interest in any portion of the Property or any adjoining properties to Developer unless and until, among other legal requirements and as applicable, (i) CEQA requirements are met, (ii) all necessary steps for any acquisition are met, including but not limited to, offers to purchase, good faith negotiations and public meetings, and (iii) a DDA satisfactory to City is first negotiated, executed by Developer, approved by the City Council of City, in the sole discretion of each, after duly noticed public hearing(s), and executed by City, as appropriate. The parties all agree to negotiate in good faith to accomplish the objectives described in this Agreement. Notwithstanding any provision of this

Agreement, City is not obligated to approve any particular permit or approval necessary to the Proposed Project or, generally, to any particular development. Developer agrees to complete applications with related documents and to diligently process necessary permits, zoning approvals or changes, or other land use approvals or changes required by the City of Upland or other governmental agencies with authority over development of the Proposed Project. The decision to grant or deny permits or other approvals relating to the Proposed Project shall be in the sole discretion of the City and other applicable governing authorities. However, City agrees to fully and reasonably cooperate in providing Developer with appropriate information and assistance in preparing the necessary plans and drawings for the Proposed Project and securing any permits or approvals that may be required by the City or other governing authorities. Any fees or charges associated with required permits or approvals shall be borne by the Developer.

- H. Planning Costs and Expenses. If the parties are unable to reach agreement on any DDA, any unexpended funds on deposit with City by Developer shall be reimbursed to Developer. Should the Parties reach agreement on a DDA, that agreement shall provide that City costs shall be reimbursed by Developer, to include costs and expenses of negotiating and finalizing this Agreement and the DDA.
- I. Forty-Five Day Time Extension. If the proposed DDA contemplated by this Agreement is timely executed by Developer and delivered to City by the expiration date of this Agreement, then this Agreement shall, without the payment of any additional negotiating fees or penalties or the explicit approval of either of the Parties, be automatically further extended for forty-five (45) days from the date of such delivery. This extension shall be for the sole purpose of enabling the City Council to publish notices, make documents available for public review, hold public hearings, consider statutorily required findings, and consider all other discretionary or legally required actions necessary or appropriate in order to decide whether or not to approve the delivered DDA. If City has not executed the delivered DDA by such forty-fifth (45th) day, then this Agreement shall automatically terminate without further notice, unless the automatic forty-five (45) day period provided for herein has been extended by prior written agreement of City and Developer.
- J. Other Time Extensions. Prior to the expiration or termination of this Agreement, the term of this Agreement may be extended by the written agreement of City and Developer. On behalf of City, this Agreement may be extended by the City Manager, without the necessity of approval by the City Council of City.
- K. DDA to Supersede this Agreement. This Agreement will be superseded by the DDA, if and when a DDA is executed by Developer, approved by the City in the manner required by law, and executed by City.
- L. Developer Responsible for CEQA Compliance. As set forth above, the Proposed Project must comply to all extents with CEQA, and it is the Developer's

responsibility to insure such compliance, including the payment for the services of all necessary consultants retained by City to comply with CEQA requirements (including, but not limited to, the preparation and issuance of any required environmental impact report or other environmental document including a supplemental impact report, negative declaration or mitigated negative declaration) all at Developer's cost. Developer shall respond fully and in a timely manner to any and all reasonable requests for information from City's consultants.

- M. Real Estate Commissions. City shall not be liable for any real estate commissions or brokerage fees which may arise in connection with any purchase or sale of real or personal property in the course of implementation of this Agreement and any DDA resulting therefrom. City and Developer each represents it has not engaged a broker, agent or finder in connection with such purposes. Each party agrees to hold harmless the other party from any claim by any broker, agent or finder retained, or claimed to have been retained, by that first party.
- N. Conflicts of Interest. For the term of this Agreement, no elected official or employee of City, during the term of his or her office or service with City, shall have any direct or indirect interest in this Agreement or obtain any present or anticipated material benefit arising therefrom.
- O. Assignment. Developer understands that City is entering into this Agreement based on the prior experience and qualifications of Developer. Therefore, Developer shall not assign, sell or otherwise transfer any or all of its rights under this Agreement to any party without the prior written approval of the City. **Michelle Thrakulchavee, Managing Director** has been primarily designated by Developer to negotiate the DDA with the City, as contemplated in this Agreement.
- P. Indemnity. Developer agrees to defend (with counsel approved by City), hold harmless and indemnify the City and each of its officers, agents and employees (the "Indemnified Parties") from and against any and all claims, causes of action, liabilities, damages, judgments, losses, costs or expenses (including, without limitation, attorneys' fees) actually caused by or resulting from Developer's acts or omissions pursuant to this Agreement; provided that the obligation to defend does not apply to actions arising solely from Indemnified Parties' acts or omissions; and provided, further, that the obligation to hold harmless applies only to the extent damages are the result of negligent acts or omissions or willful misconduct of Developer or Developer's agents, officers, owners or employees. Notwithstanding this limitation, Developer agrees to defend or pay the cost of defense of any action brought by any third party challenging the City's ability to enter into this Exclusive Negotiation Agreement on any grounds whatsoever, but expressly excluding challenges related to the Surplus Land Act.
- Q. Governing Law. This Agreement shall be interpreted and enforced in accordance with the provisions of California law in effect at the time it is executed, without

regard to conflicts of laws provisions. Any action to enforce this Agreement shall be filed in the San Bernardino Superior Court.

- R. No Third Party Beneficiaries. City and Developer expressly acknowledge and agree that they do not intend, by their execution of this Agreement, to benefit any persons or entities not signatory to this Agreement, including, without limitation, any brokers representing the parties to this transaction. No person or entity not a signatory to this Agreement shall have any rights or causes of action against either City or Developer arising out of or due to City's, or Developer's entry into this Agreement.
- S. Attorneys' Fees. In the event any action is taken by either party to this Agreement to enforce this Agreement, the prevailing party shall be entitled to recover from the other party its actual attorneys' fees and costs.

4. TERMINATION

Prior to expiration or termination of this Agreement, either Party may terminate this Agreement upon occurrence of a breach unless such breach is cured within ten (10) days after written notice to the breaching Party, provided that if such breach is not reasonably susceptible to cure within such ten (10) day period, then thirty (30) days so long as the breaching Party commences such cure within ten (10) Days and diligently prosecutes such cure to completion. Default shall be evidenced by failure to timely perform any obligations under this Agreement.

5. NOTICES

Any notice or other communication given or made pursuant to this Agreement shall not be effective unless it is given in writing and shall be delivered (a) by certified mail, postage prepaid, return receipt requested, or (b) sent by confirmed email delivery, or (c) by a commercial overnight courier that guarantees next day delivery and provides a receipt, and addressed to the Parties at the addresses stated below, or at such other address as either Party may hereafter notify the other in writing as aforementioned:

- A. To City:
Development Services Director
City of Upland
460 N. Euclid Ave.
Upland, CA 91786
Tel: (909) 931-4148
RDalquest@uplandca.gov
With copy to: City Manager
RHoerning@uplandca.gov

B. To Developer:
Michelle Thrakulchavee, Managing Director
Anastasia Preedge, Development Associate
3121 Michelson Drive, Suite 150
Irvine, CA 92612

Tel: (949) 258-7536 (Michelle) michellet@cityventures.com or
(949) 929-3134 (Anastasia) apreedge@cityventures.com

6. TIME OF ESSENCE

Time is of the essence of every provision hereof in which time is a factor.

7. ENTIRE AGREEMENT

This Agreement represents the entire agreement of the Parties and supersedes all negotiations or previous agreements between the Parties with respect to any of the subject matter hereof.

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9. EFFECTIVE DATE

The effective date of this Agreement shall be March 22, 2021


CITY OF UPLAND

By: 
City Manager

Dated: 3/23/21

DEVELOPER

CITY VENTURES HOMEBUILDING, LLC,
a Delaware limited liability company

By: 
Michelle Thrakulchavee
Authorized Signatory

Dated: 3/11/21

EXHIBIT A

LEGAL DESCRIPTION OF LAND

THAT CERTAIN REAL PROPERTY LOCATED IN THE CITY OF UPLAND, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL 1:

LOTS 6 TO 13, INCLUSIVE, BLOCK 49, TOWN OF MAGNOLIA, IN THE CITY OF UPLAND, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER PLAT RECORDED IN BOOK 9 OF MAPS, PAGE 15, RECORDS OF SAID COUNTY. TOGETHER WITH THAT PORTION OF THE VACATED ALLEY LYING ADJACENT TO SAID LAND ON THE SOUTH, AS VACATED BY RESOLUTION NO. 3465 OF THE CITY COUNCIL OF THE CITY OF UPLAND, RECORDED AUGUST 21, 1984, AS INSTRUMENT NO. 84199409, OFFICIAL RECORDS.

PARCEL 2:

THE NORTH 40 FEET OF LOTS 14 TO 20, INCLUSIVE, BLOCK 49, TOWN OF MAGNOLIA, IN THE CITY OF UPLAND, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 9, PAGE 15 OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

TOGETHER WITH THE SOUTH $\frac{1}{2}$ OF THAT CERTAIN ALLEY LYING NORTH OF LOTS 14 TO 20, INCLUSIVE, AS VACATED BY RESOLUTION OF THE CITY COUNCIL OF THE CITY OF UPLAND, RESOLUTION NO. 3465, A CERTIFIED COPY OF WHICH WAS RECORDED AUGUST 21, 1984, AS INSTRUMENT NO. 84-199409, OFFICIAL RECORDS. APN'S: 1046-591-08; 1046-591-09; 1046-591-10; 1046-591-11

PORTION OF LOTS 14, 15, 16, 17, 18, 19 AND 20, BLOCK 49 OF MANGOLIA, IN THE CITY OF UPLAND, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER PLAT RECORDED IN BOOK 9, PAGE 15 OF MAPS, RECORDS OF SAID COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE EAST LINE OF LOT 14, 40 FEET SOUTH OF THE NORTHEAST CORNER OF SAID LOT; THENCE SOUTH ALONG THE EAST LINE OF SAID LOT, 40 FEET TO A POINT 40 FEET NORTH OF THE SOUTHEAST CORNER OF SAID LOT; THENCE WEST 140 FEET TO A POINT IN THE WEST LINE OF LOT 20 OF SAID BLOCK, 40 FEET NORTH OF THE SOUTHWEST CORNER OF SAID LOT 20; THENCE NORTH ALONG THE WEST LINE OF SAID LOT 20, 40 FEET TO A POINT 40 FEET SOUTH OF THE NORTHWEST CORNER OF SAID LOT; THENCE EAST 140 FEET TO THE POINT OF BEGINNING.

APN: 1046-591-12-0-000

THE SOUTH 40 FEET OF LOTS 14 TO 20, INCLUSIVE, BLOCK 49, TOWN OF MAGNOLIA, IN THE CITY OF UPLAND, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS PER PLAT RECORDED IN BOOK 9, PAGE 15 OF MAPS, RECORDS OF SAID COUNTY.

APN: 1046-591-13-0-000

EXHIBIT B

SCHEDULE OF PERFORMANCE

Milestone Dates and Complete List of Required/Action Steps
To Be Determined and Arrived to Mutually Between City and Developer

Actions	Estimated Completion Dates	Council Meeting Dates
1. Execute Exclusive Negotiation Agreement	Within 5 days of City Council approval	
2. Establish Developer/City working Team	Within 14 days of City Council approval of ENA	
3. Submit documentation of financial capability satisfactory to City	Within 60 days of City Council approval of ENA	
4. Finalize DDA	Within 180 days of City Council approval of ENA	